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IN THE

Supreme Court of the United States

October Term, 1959

No. 1424 164

WILLIAM H. BURTON,

Appellant,

—v.—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and,

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

JURISDICTIONAL STATEMENT

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Jurisdictional Statement

Appellant, William H. Burton, appeals from the judgment of the Supreme Court of the State of Delaware of January 11, 1960, reversing a judgment of the Delaware Court of Chancery, which had enjoined the Wilmington Parking Authority, an agency of the State and its lessee, Eagle Coffee Shoppe, Inc., from refusing food service to appellant because he is a Negro. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented. In the alternative, should this Court deem appeal to be an inappropriate mode of review,

appellant prays that this jurisdictional statement be considered as a petition for writ of certiorari.

Opinions Below

The opinion of the Supreme Court of Delaware is reported at 157 A. 2d 894 (1960). The opinion of the Court of Chancery is reported at 150 A. 2d 197 (1959). These opinions are reprinted herewith in Appendix A.

Jurisdiction

This suit was brought by appellant, William H. Burton, as a class action in the Court of Chancery of the State of Delaware, in and for New Castle County, for a declaratory judgment and injunctive relief against the Wilmington Parking Authority, a public agency of Delaware, which owns and operates a large public garage in downtown Wilmington, and its lessee, Eagle Coffee Shoppe, Inc., to restrain, as a denial of equal protection of the laws secured by the Fourteenth Amendment, the refusal to serve appellant, solely because he is a Negro. The judgment of the Supreme Court of Delaware,[1] reprinted *infra* Appendix C, reversing the declaratory judgment and injunction granted by the Court of Chancery, was entered on January 11, 1960; and on February 4, 1960, the Supreme Court of Delaware without opinion denied reargument. Notice of appeal was filed in the latter court on April 28, 1960. The jurisdiction of this Court to review by appeal is conferred by 28 United States Code §1257(2). Alternative grounds for review by

[1] The decision of the Supreme Court of Delaware, as will appear later, sustained the validity of a statute of the State of Delaware, viz., 24 Delaware Code, §1501, upon which appellees justified the racial discrimination which the Court of Chancery had held forbidden by the Fourteenth Amendment to the Constitution of the United States.

Writ of Certiorari are found in 28 U. S. C., §§1257(3) and 2103. The following decisions sustain the jurisdiction of this Court to review the judgment by appeal in this case: *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Poulos* v. *New Hampshire*, 345 U. S. 395; *Ill. ex rel. McCollum* v. *Board of Education*, 333 U. S. 203. For authority to consider this appeal as petition for writ of certiorari, see *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230; *Union Nat'l Bank* v. *Lamb*, 337 U. S. 38, 39-40.

Questions Presented

Appellees admit that refusal to serve appellant, a Negro, in a restaurant operated under lease from the Wilmington Parking Authority and located in its public garage was "because of his [appellant's] race, color and ancestry." (Record: Document #10 in Court of Chancery.) Appellees defend this racial discrimination as authorized and justified by Title 24, Delaware Code 1953, Section 1501, which provides that a restaurateur shall not be obliged "to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers and would injure his business." There was no showing at all concerning offense to customers or injury to business. Against appellant's insistence that, if interpreted and applied to permit discrimination against him solely because of race, the statute was unconstitutional, the court below affirmed such interpretation and application. The questions presented in this context are:

1. Whether Title 24, Delaware Code, Section 1501, construed and applied by the Supreme Court of the State of Delaware to authorize and permit a restaurateur to discriminate solely on the ground of race, is repugnant to the Fourteenth Amendment to the Constitution of the United States.

2. Whether where this statute is construed and applied to authorize racial discrimination in a restaurant leased within the garage of the Wilmington Parking Authority, a publicly owned entity of the state, Fourteenth Amendment rights are denied.

Statutes Involved

Title 24, Delaware Code, §1501 and Title 22, Delaware Code, Chapter 5, are set forth herein in Appendix B.

Statement

Appellant, a Negro resident in Wilmington, Delaware, on August 14, 1958, parked his automobile in the public parking structure of appellee Wilmington Parking Authority (Authority) and then proceeded into a restaurant operated in the parking facility. There he sought food service and was refused, solely because of his race (Complaint and amended answer, Record: Documents #1 and #10 in Chancery).

The Authority is a public body corporate and politic, established by the City of Wilmington, Delaware, pursuant to 22 Delaware Code, Ch. 5, to construct and operate a facility for off-street parking of automobiles. That statute declares that the purposes for which a parking authority shall exist and operate are "public" uses. The Authority has the power of eminent domain. The land on which this facility is erected, however, was acquired through negotiated purchases, the purchase money coming from three sources: revenue bonds issued on the credit of the Authority, cash donated by the City of Wilmington, a bank loan to the Authority. Later the City of Wilmington gave the Authority $1,822,827.69 which was applied to redemption of revenue bonds and to repayment of the bank loan. The structure itself was erected solely from the proceeds of the

Authority's revenue bonds (Affidavit of Jay C. Pownall, Authority chairman, Record: Document #7 in Court of Chancery).

Title 22, Delaware Code, Ch. 5, §504(a) (Appendix B, *infra*) provides that the Authority may lease portions of the first floor of the facility for commercial use where such leasing is necessary and feasible for the financing and operation of such facilities. The Authority is required to be financially self-sustaining (*Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 339, 105 A. 2d 614, 1954). The Authority determined that it would be feasible to erect and operate the structure only if, in addition to fees from parking, there was income from commercial leasing of space in the structure.

Appellee Eagle Coffee Shoppe, Inc. (Eagle), a Delaware corporation, leased certain space from the Authority in April, 1957, for twenty years with a ten year option to renew. This lease required Eagle to operate a restaurant, dining room, banquet hall, cocktail lounge and bar and to engage in no other business (Affidavit of Jay C. Pownall, Authority chairman, Record: Document #7 in Court of Chancery). Eagle covenanted to "occupy and use the leased premises in accordance with all applicable laws of any federal, state or municipal authority." The Authority has the right to enforce the provisions of the lease in strict accordance with its terms. (Record: Document #6, i.e., appendix of appellant, appellee below, in Supreme Court of Delaware.)

Appellant, on August 20, 1958, filed in the Delaware Court of Chancery a complaint in a class action against the Authority and Eagle. This complaint alleged that the Authority, "acting through the instrumentality of its lessee," Eagle, "using and occupying a portion of said public facility," had refused food service to appellant, solely because of his race. This refusal the complaint alleged to be con-

duct of an agency of the State of Delaware, depriving appellant of the equal protection of the laws in violation of the Fourteenth Amendment.

When the Vice Chancellor rendered the decision of the Court of Chancery, there had been filed in that court the complaint, answers by appellees, which included an admission by Eagle that appellant was refused service because of his race, color and ancestry (Eagle's amended answer, Record: Document #10, in Chancery); motions for summary judgment by the Authority and Eagle, a countermotion for summary judgment by appellant, and affidavits in support of the motions. Appellees' motions for summary judgment set forth, in essence, two grounds: (1) that operation of the restaurant in the parking facility was the private business of Eagle and independent of control by the Authority; (2) that under a Delaware statute, 24 Delaware Code §1501, Eagle was permitted to refuse service to appellant.

The Vice Chancellor's decision, 150 A. 2d 197, Appendix A, *infra*, denying appellees' motions for summary judgment and granting appellant's motion, held the Authority to be an agency of the State engaged in furnishing a public parking service in a public facility and that the Fourteenth Amendment is applicable to all aspects of the structure and forbids discriminatory practices in the restaurant. It was "incumbent on the Authority;" the Vice Chancellor concluded, "to negotiate and enter into leases on terms which would require the tenant to carry out the Authority's duty not to deny to Delawareans the equal protection of the laws" (150 A. 2d 197, 199). Deciding thus, the Vice Chancellor stated it was unnecessary to consider appellees' reliance on 24 Delaware Code, §1501.

The Supreme Court of Delaware was of the opinion (157 A. 2d 894, Appendix A, *infra*) that the only concern the

Authority had with Eagle was the receipt from Eagle of rent, "without which it [the Authority] would be unable to afford the public the service of off-street parking." It therefore concluded that Eagle's discriminatory act was not that of the Authority. Accordingly, having decided that Eagle, lessee of the Authority, was acting in a "purely private capacity," the Supreme Court, in the face of Eagle's admission that it refused to serve appellant because of his color, and because of color alone, with no evidence at all before it on the question of "offense" to other customers, or "injury" to business (operative terms of the statute), held that 24 Delaware Code §1501 authorized Eagle to refuse to serve appellant solely on the basis of race, and reversed the Vice Chancellor.

How the Federal Questions Are Presented

The federal questions in this case are presented and were disposed of in the courts below in the following manner:

a. Initially, a Federal question is presented by the complaint which alleges that the Wilmington Parking Authority in the operation of a publicly owned structure and the Authority's lessee, Eagle, discriminated against appellant on the ground of race in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Pursuant to regular state practice appellant's trial court brief (Record: Document #11. in Chancery) opposing appellees' brief in support of their motion for summary judgment, argued that Eagle was so closely identified with the Authority in effectuating its public purpose that the Fourteenth Amendment rules applicable to the state agency applied. Appellant's argument was sustained by the judgment of the trial court.

b. Second, a federal question was raised by appellant in the trial court on appellees' motion for summary judgment

based on the ground that 24 Delaware Code §1501 permits Eagle to refuse service to appellant on the ground of race. In accordance with Delaware practice, appellant's brief urged that, if the Delaware statute were applied to authorize Eagle to make discriminatory regulations based solely on race, the discriminatory exclusion by Eagle emanated not from its private action but under the aegis and sanction of discriminatory legislative action, which is state action of a kind prohibited by the Fourteenth Amendment.

c. Again, in the Supreme Court of Delaware, defending the judgment below, each of the above arguments raising a federal question was made by appellant's brief (Record: Document #7 in Supreme Court of Delaware) in the mode appropriate to raise such questions under state law. In that court also, consonant with the admission in the record that appellant was refused food service only because of his race, appellees argued that 24 Delaware Code §1501 permits Eagle to exclude appellant although none of the factors enumerated in the statute (i.e. offensiveness and injury to business) were established in the record. The Authority argued below that "no issue of fact [was] raised by application of Section 1501" and that the Court below could, as a "short cut," take judicial notice that appellant is "a member of a class of persons offensive to a 'major part' of cafe customers . . . a notorious and self-evident fact" (Brief of Wilmington Parking Authority, Record: Document #3 in Supreme Court of Delaware, p. 15). Appellant insisted below that the statute so construed would violate the Fourteenth Amendment (Record: Document #6 in Supreme Court of Delaware, p. 22). However, the Supreme Court of Delaware held that Eagle was a private enterprise immune from the Fourteenth Amendment, that the Authority was not constitutionally answerable for the racial discrimination of which appellant complains; and it applied and enforced the statute as authorizing Eagle to exclude appellant

because of his race notwithstanding complete absence of evidence as to appellant's offensiveness or any injury he would do Eagle's business.

The Questions Are Substantial

Appellant submits that the questions involved herein are substantial and merit plenary consideration by this Court. The opinion below conflicts with a consistent line of decisions by this Court, United States Courts of Appeals, District Courts, and the highest courts of several states on important federal constitutional questions. Because appellant prays that this jurisdictional statement be considered in the alternative as a petition for a writ of certiorari pursuant to 28 U. S. C. §§2103, 1257(3) in the event that appeal is deemed an inappropriate mode of review, it is suggested respectfully that the conflict of decisions and the public importance of the questions involved afford sound basis for the exercise of this Court's certiorari jurisdiction.

This case involves questions of the responsibility of a state government agency and the lessee of a portion of a building owned and maintained by it to accord equal treatment to Negro citizens as well as the constitutionality of a state statute interpreted by the court below to authorize appellant's exclusion from such facility solely because of his race.

It is plainly of great public importance to our nation that our courts, both state and federal, give full and fair implementation to the equalitarian principles of the Fourteenth Amendment to the Constitution of the United States and protect all citizens from racial discrimination at the hands of governmental agencies. The freedom of citizens

from racial discrimination by the state is of fundamental importance to our system and basic in our national ideals.[2]

I

This case presents the question of whether the Supreme Court of Delaware may employ 24 Del. Code §1501 as justification for appellee Eagle's exclusion of appellant from its restaurant. After arriving at the conclusion that Eagle is a private enterprise immune from the Fourteenth Amendment, the court below turned to the statute which justifies barring a would-be patron if he is offensive to a majority of an establishment's patronage and his presence would injure the business. There was not a whit of evidence on offensiveness or injury to business. There is only the admission that appellant was excluded solely because of his race. Appellee's brief merely prayed that the state Supreme Court take notice of the "notorious" and "self-evident" fact that Negroes are offensive. On this foundation and nothing more, the Delaware Supreme Court held that Eagle was exonerated by the statute. It is now too well established to require any extended argument that a statute which authorizes racial distinctions is patently violative of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Gayle* v. *Browder*, 352 U. S. 903.

This case also presents the racial discrimination question in a context that has recurred in litigation over a number of years, as the list of authorities cited below indicates. The overwhelming weight of authority in cases involving racial discrimination in state-owned leased property is that governmentally owned properties and facilities managed by lessees and concessionaires, holding no governmental office,

[2] See, e.g.: Cooper v. Aaron, 358 U.S. 1, 19, 20; Gibson v. Mississippi, 162 U.S. 565, 591-592.

are subject to the restraints of the Fourteenth Amendment against racial discrimination. *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971, vacating and remanding 202 F. 2d 275 (6th Cir. 1953) (leased open air theater); *Tate* v. *Department of Conservation*, 133 F. Supp. 53 (E. D. Va. 1955), aff'd 231 F. 2d 615 (4th Cir. 1956), cert. den. 352 U. S. 838 (leased beach); *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956), cert. den. 353 U. S. 924 (leased cafeteria); *City of Greensboro* v. *Simkins*, 246 F. 2d 425 (4th Cir. 1957), affirming 149 F. Supp. 562 (M. D. N. C. 1957) (leased golf course); *Aaron* v. *Cooper*, 261 F. 2d 97 (8th Cir. 1958) (leased school); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948) (leased swimming pool); *Jones* v. *Marva Theatres Inc.*, 180 F. Supp. 49 (D. C. Md. 1960) (leased motion picture theatre); *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E. D. Va. 1949) (leased restaurant); *Coke* v. *City of Atlanta*, —— F. Supp. —— (N. D. Ga., January 6, 1960) (leased restaurant), cited with approval in *Henry* v. *Greenville Airport Commission*, —— F. 2d —— (4th Cir. 1960); *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948) (leased swimming pool); *Kern* v. *City Commissioners*, 151 Kans. 565, 100 P. 2d 709 (1940) (leased swimming pool). Cf. *Lincoln Park Traps* v. *Chicago Park District*, 323 Ill. App. 107, 55 N. E. 2d 173, 175, 176 (1944) (leased skeet shooting range).

II

Both appellees justified the racial discrimination practiced against appellant by Title 24 Delaware Code §1501, which provides that a restaurant proprietor may exclude anyone "whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business." Appellant contended below that this statute would be unconstitutional under the Fourteenth

Amendment it applied to permit his exclusion on the basis of race alone. The Supreme Court of Delaware upheld the appellees' argument finding that the statute justified the exclusion of appellant on the record presented.

In this connection it must be noted that there was no allegation, proof, or suggestion that appellant was "offensive" to any of appellees' customers in any way or would have any effect on appellees' business. Appellees admit that the exclusion was solely because of race and rely simply on appellant's presumed offensiveness because of his race to establish their right to exclude him. The Court below adopted this construction of the statute, thus interpreting the statute to specifically provide for the exclusion of Negroes as such. So interpreted and applied to the appellant the statute patently violates the Fourteenth Amendment, for that amendment prohibits not only legislation which explicitly works a racial discrimination but "state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." *Civil Rights Cases*, 109 U. S. 3, 11. It matters not that this racial proscription was read into the statute by judicial construction, rather than written into it by the legislature. Racial discrimination by judicial action is as unconstitutional. *Shelley* v. *Kraemer*, 334 U. S. 1.

Here one state statute created a governmental agency and authorized it to acquire property and lease portions of it to private businesses, and another statute authorized the exclusion of plaintiff from the leased premises owned by the government simply upon the basis of race and nothing more. The hand of government weighs heavily indeed in the racial discrimination imposed upon appellant. Under well settled principles he is entitled to relief against state conduct of this sort.

III

Moreover, the decision below upholds racial discrimination in a state-owned facility contrary to well settled interpretations of the Fourteenth Amendment. The court below has reached a result contrary to that in all of the cases cited above, *supra*, p. 11, plainly a gross departure from the law. Beyond this, the opinion below rests on standards which, if not overruled, will not only deprive countless Delaware citizens of constitutional rights, but will introduce a standard corrosive of the well settled "state action" rule governing state-owned leased property. The decision below appears to rest on the following conclusions pertinent to this aspect of the case:

1. Although the Wilmington Parking Authority is a creature of the state and performs a public function as an agency of the state, only $934,000, "approximately 15% of the total cost is represented by the public 'advance' of money" (157 A. 2d at 901). Such "a slight contribution is insufficient" to warrant a finding of state action (*id.* at 901). Moreover, "Eagle at its own expense installed the major portion of the furnishing of its restaurant" while "the Authority installed a bare minimum [of fixtures] in the space ultimately leased to Eagle" (*id.* at 899).

2. The eating-place, which is a part of the structure built, owned, and operated by the Wilmington Parking Authority and from which appellant was excluded because of his race, is operated by a private lessee. It was, the Court below held, entirely "immaterial to the Authority what type of business should occupy the space now occupied by Eagle. The Authority's sole interest was in obtaining money in the form of rent." Further: "It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a

lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking" (*id.* at 901).

3. The Court below took judicial notice of the fact that the "main and marked public entrance" to the Eagle restaurant is from the street and not within the garage (*id.* at 899), and concluded that the Authority does not operate the business of Eagle, "has not located the business of Eagle within the facility for the convenience and service of the public using the parking service, and has not financially enabled the business of Eagle to operate" (*id.* at 902).

4. The judicial philosophy, which compelled the result in the light of the above, was stated as follows:

> . . . We apply the law, whether or not that law follows the current fashion of social philosophy.
>
> Particularly, is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone (*id.* at 901-902).

As will be more fully indicated *infra*, appellant contends that the exact cost figures and the proportion of funds derived from what the court below deemed "public" and "non-public" sources in connection with the Authority's project are unimportant and have no proper bearing upon the deci-

sion as to whether or not the Fourteenth Amendment applies to the appellees. However, it is well to point out some subsidiary errors made by the court below.

a. The court below said that $934,000 was "advanced" by the City of Wilmington to purchase land for the parking facility, and that this was the only "public" contribution of funds. This figure is found in another opinion involving the Authority, which was rendered prior to actual construction of the parking facility, *Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 439, 105 A. 2d 614, 618 (1954).[1] However, the figure is in conflict with undisputed facts in the present record which go unmentioned in the opinion below. It appears from *this* record that:

> Subsequently *the City of Wilmington gave the Authority $1,822,827.69* which sum the Authority applied to the redemption of the Revenue Bonds delivered to Diamond Ice & Coal Co. and to the repayment of the Equitable Security Trust Company loan." (Emphasis supplied) (Affidavit of Jay C. Pownall, Chairman of appellee parking authority; Record: Document #7 in Chancery Court).

b. The court below also said that the $934,000 advance (discussed above) was but 15% of the total cost of the facility which is reasoned by the court (from facts outside this record) to have been $6,100,000. This latter figure

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[1] Where constitutional rights are involved this Court will make its "own independent examination of the record," Napue v. Illinois, 360 U.S. 264, 271, 272, and is not bound by the conclusions of the court below, Spano v. New York, 360 U.S. 315, 316; Norris v. Alabama, 294 U.S. 587; Niemotko v. Maryland, 340 U.S. 268; and cases collected in Napue, supra, at 360 U.S. 264, 272, note 4.

[2] In that "test case" the authority sued a taxpayer for a declaration that 22 Del. Code Chapter 5 was valid. Ruling on certified questions the court held the statute valid. Appellant Burton was not a party to the case.

(not mentioned in *Ranken*) was hypothesized by the court from a ratio between the estimated cost of a garage without space for commercial leasing (estimated between $3,600,000 and $3,800,000 at the time of *Ranken;* 105 A. 2d at 618), and a *planned* allocation of costs between parking and leased areas, indicated by *Ranken* to be 38.4% for parking spaces and 61.6% for leased areas.

Appellant's petition for reargument below (Record: Document #10 Supreme Court of Delaware) urged that the cost figure derived by the court was not only outside the record of this case, but was in fact erroneous and very much greater than the actual cost of the facility, which error thereby minimized what the court below considered to be the extent of the "public" contribution.

Certainly either the court's figure ($934,000) or the figure in the Authority chairman's affidavit (over $1,800,000) represents a substantial contribution by the public. But not only did the court make an unwarranted determination that the above contribution was "slight." In addition, the court indulged the erroneous assumption that funds derived by the Authority through public sale by it, a governmental agency, of its revenue bonds are not "public" funds and that their use is not controlled by the Fourteenth Amendment. Appellant contends to the contrary that all of the funds used in erecting the Authority building were "publicly" raised and administered, and that the rule stated in *Cooper* v. *Aaron*, 358 U. S. 1, 4, is applicable here, i.e.: "state participation through any arrangement, management, funds or property" is sufficient to invoke the Fourteenth Amendment's prohibition of racial discrimination.[5] *Pennsylvania* v. *Board of Directors of City Trusts*, 350 U. S. 230, held that public trustees, whose official position made

[5] Note the subsequent application of this rule in Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958) (leasing arrangement condemned).

them agents of the State of Pennsylvania, could not administer in a racially discriminatory manner even a trust fund created by an individual out of his own private fortune. The same principle applies to the various funds involved in connection with the property of the appellee Authority.

The decision below also rests on the court's inquiry into whether Eagle was established in the parking building in furtherance of a specific governmental purpose to provide restaurant service for the public. The court concluded that the Authority's purpose was simply to obtain rent needed to make the building financially self-sustaining. It held that since the Authority's purpose was not to provide a restaurant, the restaurant in its building is immune from the restraints of the Fourteenth Amendment.

Appellant urges that the state's purpose in arranging that the restaurant be installed on its property is irrelevant. In passing, it should be observed that the holding below conflicts with conclusions in the *Ranken* case where commercial leasing of this property was sustained as merely an incidental use which "does not destroy the public character of the project as a whole," such leasing being "deemed a use of public property subordinate to the public use" (105 A. 2d 614).

But more fundamental, inquiry into the government's purpose, like inquiry into the ratio between the general public funds contributed to build the facility and the funds raised by the sale of the Authority's bonds, is beside the point. While such factors perhaps have played a part in cases of discrimination where government participation has not risen to the extent of full ownership, this type of analysis has not been indulged in cases of property owned by the government and leased for "private" operation. Compare *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (4th Cir. 1945), cert. den. 326 U. S. 721, with the lease cases cited *supra*, p. 11. Heretofore it has been plain

that governmentally owned property and facilities must not be operated so as to work racial discrimination—no matter what the property arrangements, financing methods or purposes. *Cooper* v. *Aaron, supra.*

To uphold the decision of the Supreme Court of Delaware would encourge a rule requiring inquiries in each case of racial discrimination upon government property into the government's purpose, the apportionment of expenditures and profits between government and its lessee (and, between different methods of government financing), and into the specific nature of the rights reserved by governmental authorities in leases and contracts. Such a rule would introduce confusion into one of the few areas of "state action" jurisprudence where the law has heretofore been simple and clearly predictable. Negro citizens' rights to equal treatment under such a rule would depend upon chance factors such as the refinements of local property and contract law and the ingenuity of governmental officials in developing property and financial arrangements in connection with the use of government facilities. As recently stated by this Court in connection with illegal searches and seizures, subtle and gossamer distinctions of property law ought not be determinative of constitutional rights. *Jones* v. *United States*, —— U. S. ——, 4 L. ed. 2d 697, 705.[6]

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[6] At 4 L.ed 2d 705 the Court wrote:

> We are persuaded however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive due consideration has led to the discarding of these distinctions in the homeland of the common law. . . . Distinctions such as those between "lessee", "licensee", "invitee" and "guest", often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

Distinctions between the "primary" use and "subordinate" use of government property, and between money from general public treasuries and money raised by the sale of the bonds of a public agency, have little relevance to the question of whether or not the activities complained of are within the reach of the Fourteenth Amendment's nullification of "state action of every kind" which denies citizens the equal protection of the laws. *Civil Rights Cases*, 109 U. S. 3, 11.

The decision below on the question of "state action" conflicts with the decision in *Derrington* v. *Plummer*, 240 F. 2d 922, *supra*. In *Derrington* v. *Plummer*, *supra*, the cafeteria in a county-owned courthouse was held constitutionally forbidden to discriminate on the basis of race. The cafeteria was operated by a private entrepreneur. If as is suggested by the rationale of the Delaware Supreme Court, the cafeteria in *Derrington* served a governmental purpose only in that it was a food service facility provided for the use of courthouse personnel, litigants, witnesses and other persons in the building on business, a rule of nondiscriminatory service would reasonably extend to such persons alone. But it does not appear that the plaintiff in *Derrington* was other than a member of the general public. More recently in *Jones* v. *Marva Theatres, Inc.*, 180 F. Supp. 49 (D. C. Md. 1960), a motion picture theatre housed in the city opera house of Frederick, Maryland, in which the city hall also is situated, was held forbidden to discriminate. It can hardly be suggested that the motion picture theatre in *Jones* fulfilled any more of a public purpose than the cafeteria here, yet Judge Thomsen enjoined the lessee in that case from discriminating on the basis of race. Probably an important function of the theatre was to furnish the city with revenue, as there was another theatre in the town.

Certainly the concept of "public" purposes has expanded greatly in recent years. Yet the reports are replete with decisions, cited p. 11, *supra*, holding that governmentally-owned golf courses, swimming pools and park facilities may not discriminate on the basis of race, even though leased to private operators. But at bottom, even if a public purpose test were to be applied in this case, the Eagle restaurant does serve a public purpose, and the Supreme Court of Delaware has so held, i.e., paying rental which permits the parking authority to operate its garage—which otherwise would be running a loss—for the benefit of the downtown section of Wilmington, Delaware.

The court's conclusion that the Authority has not "financially enabled the business of Eagle to operate" is a meaningless truism if it merely reiterates that the arrangement is not unprofitable to the Authority. If the statement implies that Eagle does not also profit from the arrangement, it surely has no basis, for there is no suggestion in the record that Eagle anticipated and realized no profit from its business under the arrangement with the Authority. In this case, as in other cases of leased state property such as *Derrington* v. *Plummer*, *supra*, *Jones* v. *Marva Theatres, Inc.*, *supra*, *Nash* v. *Air Terminal Services*, *supra*, and *Coke* v. *City of Atlanta*, *supra*, the lease was obviously negotiated with respective expectations that the arrangement would be financially profitable to both lessee and lessor.

The Authority cannot excuse itself from obedience to the Fourteenth Amendment by arguing that it is powerless because it has bartered away for twenty years, with a ten year renewal option, to a lessee, its right to insist on equal treatment for Negroes. Cf. *Cooper* v. *Aaron*, 358 U. S. 1.

Despite the attention which the court below devoted to the question of control it ignored one overwhelming and

dispositive factor. The authority owns the fee. At the time it negotiated the lease it was empowered to impose upon the lessee a requirement of nondiscrimination. If the lessee would not have agreed to such a clause, the Authority under the Fourteenth Amendment, should have found a lessee who would have consented. Clearly in Wilmington, Delaware, the record demonstrates (Record: Documents #12 and #13 in Chancery), such a lessee would not have been difficult to come by.

It is submitted that the Vice Chancellor was eminently correct when he wrote that "it was incumbent on the Authority to negotiate and enter into leases such as the one here involved on terms which would require the tenant to carry out the Authority's constitutional duty not to deny to Delawareans the equal protection of the laws" (150 A. 2d 197, 199). Previous attempts by states to divest themselves of the power to insist on nondiscrimination have been exposed and state responsibility has been recognized. See *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947), cert. denied 333 U. S. 875 (discrimination in South Carolina primary unconstitutional although state had repealed statutory references to primary); *Terry* v. *Adams*, 345 U. S. 461; *Smith* v. *Allwright*, 321 U. S. 649.

Neither can the Authority's excuse that it was merely engaged in a proprietary or a money-making venture justify racial discrimination on its property, by removing it from the ambit of the Fourteenth Amendment. See *City of St. Petersburg* v. *Alsup*, 238 F. 2d 830 (5th Cir. 1956), cert. den. 353 U. S. 922 where a distinction between "proprietary" functions and "governmental" functions was rejected as a basis for applicability of Fourteenth Amendment safeguards.

CONCLUSION

For the foregoing reasons it is submitted that this cause presents substantial federal constitutional questions of public importance which merit plenary consideration by this Court for their resolution.

Respectfully submitted,

LOUIS L. REDDING
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Wilmington 1, Delaware
Counsel for Appellant

APPENDIX A

Opinion of Chancery Court

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1029

WILLIAM H. BURTON,

Plaintiff,

—vs—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Defendants.

(April 15, 1959)

MARVEL, Vice Chancellor: Plaintiff, admittedly a person within the jurisdiction of the State of Delaware and a citizen, brings this class action for a declaratory judgment in the form of injunctive relief against the action of the defendant, Eagle Coffee Shoppe Inc., a purveyor of foodstuffs and beverages, in refusing to serve him at its restaurant. It is admitted that plaintiff was refused service at such restaurant solely because he is a Negro, and all parties have moved for summary judgment on the basis that there is no material fact in dispute.

The Wilmington Parking Authority, which owns the space in which the Eagle Coffee Shoppe is located, is alleged to be an agency of the State and to have acquiesced in and

consented to a discriminatory practice of the restaurant violative of the Fourteenth Amendment to the Constitution of the United States, and is therefore joined as a defendant to this class action.

There is no doubt but that the Fourteenth Amendment forbids any state action which denies to any person within its jurisdiction the equal protection of the laws. However, the Parking Authority, while clearly a State agency, disclaims any control over the policies of its tenant, the restaurant. It contends that it has not purported to dictate to the restaurant as to how its business should be run, and that the lease granted the Eagle Coffee Shoppe is a strictly business transaction between landlord and tenant, consummated as a corollary to the creation of rental space in the parking facility in question for the express purpose of defraying in large part the financing and operation of such public facility.

Obviously, the Fourteenth Amendment plays no part in purely private acts of discrimination, its force coming into play when a state or one of its agencies or subdivisions fails to deal equally with any person within its jurisdiction.

In deciding whether or not discrimination violative of the Fourteenth Amendment has occurred, Courts make a determination as to whether or not the property involved in the action is in effect publicly owned, and if there is no clear showing of public ownership, whether or not state control is being exercised over a privately owned facility.

Thus, in Eaton v. Board of Managers (C. A. 4), 261 F2nd, the fact that a hospital established pursuant to public law was succeeded by a privately built hospital operated by its own board, thereby removing the hospital from the category of a publicly owned institution,[1] compelled a holding that Negro doctors did not have a constitutional right to insist

[1] The only public moneys currently received by the hospital were paid by the County for the care of indigent patients.

that they not be barred from hospital staff status solely because of their race or color. Compare Mitchell v. Boys Club (D. C. Dist. of Columbia), 157 F. Supp. 101, and Kerr v. Enoch Pratt Free Library (C. A. 4), 149 F2nd 212.

On the other hand, when a Negro seeks rights in property owned by a state agency or by a state political sub-division, the device of a lease of such property to a concessionaire will not serve to insulate the public authority from the force and effect of the Fourteenth Amendment, Lawrence v. Hancock (D. C. S. D. W. Va.), 76 Supp. 1009 (a public swimming pool), and there would seem to be no valid basis for distinction when the leasing of space by a public authority is not a patent attempt at subterfuge but a good faith method of furnishing service to the public through a tenancy, Derrington v. Plummer (C. A. 5), 240 F2nd 922, cert. denied, 353 U. S. 924 (a restaurant in a county courthouse), and Nash v. Air Terminal Services, Inc. (D. C. E. D. Va.), 85 F. Supp. 545 (a restaurant in a federally owned airport and so subject to the Fifth Amendment).

Conversely, where there are no public moneys or property involved, discrimination may be constitutionally forbidden because of the existence of governmental control over the operation of a privately owned institution or facility, Commonwealth of Pennsylvania v. Board of City Trusts, 350 U. S. 230.

There is no doubt but that the Parking Authority is a tax exempt agency of the State engaged in furnishing public parking service in a facility, the financing of which is being borne in large part by rentals received from tenants occupying other parts of the building, Wilmington Parking Authority v. Randolph (Sup. Ct. Del.) 105 A2nd 614. Because these rentals constitute a substantial and integral part of the means devised to finance a vital public facility, in my opinion it was incumbent on the Authority to negotiate and enter into leases such as the one here involved on terms

which would require the tenant to carry out the Authority's constitutional duty not to deny to Delawareans the equal protection of the laws. To say that the Authority had no statutory power to operate the restaurant itself is to beg the question in view of the direct relation of rental income to the financing of the facility.

The lease here provides that the tenant " . . . shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority," and despite the Authority's disclaimer of control over the policies and practices of the Eagle Coffee Shoppe, I am satisfied that the Fourteenth Amendment to the Constitution of the United States is applicable to the operation of all aspects of the structure here involved, and that it forbids discriminatory practices in the restaurant in which plaintiff seeks to establish class rights.

Plaintiff is entitled to a declaratory judgment to such effect. In view of this holding it is unnecessary to consider the common law pertaining to innkeepers or defendants' reliance of §1501 of Title 24, Del. C. as a purported modification of such common law rule.

An appropriate order may be submitted denying defendants' motions and granting plaintiff's motion for a declaratory judgment as prayed for in the complaint.

Order

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1029

WILLIAM H. BURTON,

Plaintiff.

—vs.—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Defendants.

IT IS HEREBY ORDERED as follows:

1. That the Motions for Summary Judgment filed, respectively, by the defendant, The Wilmington Parking Authority, and the defendant, Eagle Coffee Shoppe, Inc., are hereby denied.

2. That plaintiff's Motion for Summary Judgment is hereby granted.

3. That the policy, practice, rules, regulations and usage of the defendants, or either of them, denying, by reason of color, race or ancestry, to the plaintiff or any other colored person or Negro, the right and privilege to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the restaurant operated by the defendant Eagle Coffee Shoppe, Inc., in

the parking facility owned by defendant Wilmington Parking Authority and situate on the Southerly side of Ninth Street between Orange and Shipley Streets, in Wilmington, Delaware, are hereby declared in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. The defendants, their officers, agents, members and employees are hereby permanently enjoined from denying, by reason of color, race or ancestry, to the plaintiff or any other colored person or Negro the right to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the aforementioned restaurant.

5. That the court costs of this action be assessed against the defendant.

s/ WILLIAM MARVEL
Vice-Chancellor

APPROVED AS TO FORM

s/ CLAIR JOHN KILLORAN
Attorney for Wilmington Parking Authority

s/ THOMAS HERLIHY, JR.
Attorney for Eagle Coffee Shoppe, Inc.

s/ LOUIS L. REDDING
Attorney for Plaintiff

Opinion of Supreme Court of Delaware

IN THE
SUPREME COURT
OF THE STATE OF DELAWARE

No. 38, 1959

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Appellants,

—vs.—

WILLIAM H. BURTON,

Appellee.

(January 11, 1960)

SOUTHERLAND, *C.J.*, WALCOTT and BRAMHALL, *JJ.*, sitting.

Appeal from the Court of Chancery in and for New Castle County.

WOLCOTT, *J.*:

This action seeks a declaratory judgment that Eagle Coffee Shop, Inc. (hereafter Eagle), the lessee of Wilmington Parking Authority (hereafter the Authority) may not operate its restaurant business in the parking structure at Ninth and Shipley Streets, Wilmington, in a racially-discriminatory manner. The action was commenced by the plaintiff, a Negro, who was denied service by Eagle solely because of his race, color and ancestry, which, plaintiff argues, abridged his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

There are no disputed issues of fact. Consequently, all parties below moved for summary judgment. The Vice-Chancellor granted judgment for the plaintiff, holding that the Fourteenth Amendment is applicable to the operation of all aspects of the parking structure, and that it forbids discriminatory practices in the restaurant of the Authority's lessee. The defendants appeal.

The plaintiff's position is that the Authority is performing a public or state function in operating the public parking facility in question and, as an instrumentality of the state, is required to insure that the operation of the public facility shall not be in a racially-segregated manner. Plaintiff further argues that Eagle, as lessee, is the instrumentality of the Authority, admittedly an agency of the state, and that its discriminatory acts are in law the acts of the state and, hence, violative of the Equal Protection Clause of the Fourteenth Amendment. The court below so ruled.

The Authority's position is that it has not discriminated racially against the plaintiff because it has no legal or *de facto* control over the operation of Eagle's restaurant. It argues that its sole interest in the Eagle lease is the deriving of rent therefrom in order to defray the expense of operating the parking facility, an otherwise unprofitable operation required, however, to be self-sustaining. Accordingly, the Authority argues that Eagle's refusal to serve the plaintiff was private and not state action subject to the interdict of the Fourteenth Amendment.

Eagle joins in the position taken by the Authority and, in addition, relies on 24 *Del. C.*, §1501 which provides that no restaurant shall by law be obligated to give service to persons if such service would be offensive to the major part of its customers to the injury of its business. This statute, Eagle argues, is a codification of the common law relating to the duties of restaurant keepers.

Since the decision of the Supreme Court of the United States in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 74 S. Ct. 686, the states and their instrumentalities have been required to act within the scope of state action in a racially non-segregated manner. If, therefore, Eagle is, as plaintiff contends, the ultimate instrumentality of the state performing a state function, the Fourteenth Amendment requires it to serve the plaintiff and all others with his racial background.

The ultimate question for our determination, therefore, is whether or not, under the decisions cited to us, the Eagle restaurant business is cast with such public character as to make it in law a state function, carried on under the auspices and with the support of the public authority. We turn to the authorities cited to us for the answer.

Nash v. *Air Terminal Services, Inc., et al.*, 85 F. Supp. 545, was a case decided under the now discarded doctrine of separate but equal facilities for Negroes. The case, however, seems pertinent not only because of its factual resemblance to the case at bar but, also, as an enunciation of a test for determining when certain actions may or may not be attributed to the public government.

In the *Nash* case the plaintiff, a Negro using the facilities of the Washington National Airport for air transportation, sought and was refused service in a restaurant operated in the terminal building. The restaurant in question was operated on a concession from the public government in a building constructed entirely with public money and operated for the serving of persons using an airport constructed entirely with public money. Under these facts it was held that the plaintiff had been denied his rights since, at the time, there were no separate but equal facilities offered for Negro patrons of the airport. *A fortiori*, if the failure to supply separate but equal facilities at a time when that

doctrine was part of our constitutional law was a deprivation of the rights of the plaintiff, once that doctrine is struck down the plaintiff's rights would be denied by the refusal of any service.

Derrington v. *Plummer*, 240 F. 2d 922, dealt with the refusal of service to a Negro in a cafeteria installed and operated in the basement of a county courthouse. The facts were that some time in 1953 the county contemplated the erection of a new courthouse. In the plans of the building a portion of the basement was set aside and reserved for a cafeteria to be operated primarily for the benefit of persons having business in the courthouse. The courthouse, including the cafeteria facilities, was completed entirely with public funds. Thereafter, the cafeteria was operated by a private lessee. The cafeteria served persons having business in the courthouse and public employees, and, also, was open to the public. The plaintiff, a Negro, sought service and was refused because of his race.

It was held that the lessee was subject to the prohibitions of the Fourteenth Amendment as the agent of the state. The rationale of the decision is that the courthouse having been built with public funds for the use of the public, the original plans having provided for the inclusion of a cafeteria for the use of the public, and the cafeteria, itself, having been equipped and furnished by the county, the state could not avoid the constitutional requirement of nondiscrimination by leasing to a private business.

Culver v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82, was a case in which the plaintiffs, Negro citizens of Ohio, sought the right to use and enjoy a municipal swimming pool, built at public expense. It appeared that when completed the swimming pool had first been opened on a non-discriminatory racial basis but that, from that, trouble and disorder had ensued. The city ceased to operate the swimming pool and leased it to a veterans organization at

an annual rental of 10% of the gate receipts: the city, however, paying all maintenance costs. The veterans organization, the lessee, operated the pool in a racially-discriminatory manner.

It was held that the lease to the veterans organization was a subterfuge adopted by the city to avoid the requirements of the Fourteenth Amendment. The court was of the opinion that, under the circumstances, the veterans organization was an instrumentality of the city which, in turn, of course, was an instrumentality of the State of Ohio and, thus, was subject to the provisions of the Fourteenth Amendment.

Substantially to the same effect is the case of *Kern* v. *City Com'rs of City of Newton, et al.*, 151 Kan. 565, 100 P. 2d 709.

Muir v. *Louisville Park Theatrical Assn.*, 347 U.S. 971, 74 S. Ct. 783, was a case in which the City of Louisville had erected in one of its public parks an amphitheater, owned and maintained by the city. It appeared that the amphitheater was an appropriate adjunct of the city's park maintained for all the people. The city leased the structure to a theatrical association which, under the terms of its lease, had the right to charge admission fees and to sell refreshments. The plaintiff, a Negro, was denied admittance to a performance in the amphitheater given by the theatrical association.

The District Court held, and was affirmed on appeal to the Court of Appeals, that the city was guilty of no racial discrimination because there was no evidence that any comparable Negro theatrical association had applied to the city for use of the amphitheater. On petition for certiorari to the Supreme Court of the United States the judgment in the *Muir* case was reversed and the case remanded for consideration in the light of *Brown* v. *Board of Education*, supra.

The reason for the reversal is not set forth in full, but it seems apparent that the Supreme Court had in mind the circumstances that the city had built and maintained from public funds an amphitheater for public use and, under the circumstances, any lessee operated it as an instrumentality of the city.

Pennsylvania v. *Directors of City Trusts*, 350 U. S. 230, 77 S. Ct. 1281, was a *per curiam* opinion holding that the trustees under the will of Stephen Girard, appointed by the City of Philadelphia, could not perform their duties under the trust created for the education of "white male orphans" in a manner to discriminate against Negro male orphans. Plaintiff points out that Stephen Girard, by his will, had created a trust out of his private fortune but that, nevertheless, the principles of the Fourteenth Amendment were held to apply to the operation of the trust by the trustees. The element of public control, apparently, was that the trustees of the Girard Trust were publicly appointed trustees in complete control of the operation of a privately endowed trust.

We think a careful consideration of the foregoing cited authorities leads necessarily to the conclusion that the provisions of the Fourteenth Amendment relating to equal protection of the laws apply to the operation of any facility or any other thing created at public expense or operated by public authority.

In the *Nash* case, for example, the air terminal at the Washington National Airport had been erected solely with public funds and the restaurant involved had been contemplated initially as a service to persons using the National Airport. Furthermore, it is not clear that the public government did not exercise ultimate control over operation of the restaurant since it was operated as a concession of the public government.

Similarly, the *Derrington* case involved a facility constructed entirely with public funds which contained, from the planning stage onward, a cafeteria intended for the use of the public. The cafeteria, itself, was constructed and equipped by public money and was operated primarily for the benefit of the persons using the courthouse. Consequently, while technically there may have been no direct control over the lessee who operated the cafeteria, the lessee was nevertheless operating a facility erected entirely by the public treasury for the purpose of serving the public.

The *Culver* and *Kern* cases were cases also of publicly paid for facilities. These cases also contain the additional circumstance of an attempt by subterfuge to avoid the prohibitions of the Fourteenth Amendment. The *Muir* case similarly is a case of the erection and maintenance entirely with public funds of an appropriate adjunct of a public park.

The *Girard College* case apparently falls within the scope of the Fourteenth Amendment solely by reason of the fact that the trustees administering the trust created by Stephen Girard were publicly appointed. It is interesting to note that since the *per curiam* decision of the Supreme Court of the United States, the State of Pennsylvania has abrogated the right of the City of Philadelphia to appoint the trustees administering the Girard Trust, thus, presumably, eliminating the requirement that such trust be administered in a racially non-discriminatory manner. Cf. *In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844, cert. den. 357 U.S. 570.

It thus seems apparent to us from the cited authorities that the Fourteenth Amendment is applicable to the operation of a facility, either public or quasi-public in nature, if either the facility has been erected and is maintained with public money, or if the operation of such a facility is conducted under public auspices or control.

We turn now to the particular facts of the case at bar. Initially, we should observe that the plaintiff in the case at bar has not been discriminated against by the Authority in the operation of the public parking portion of the facility since the record discloses that at the time this incident occurred the plaintiff had parked his car in the public parking portion and, thereafter, proceeded to the Eagle restaurant where he was denied service.

The facts surrounding this controversy and the physical aspect of the Authority's facility do not appear in much detail in the record before us. However, we think we are at liberty to take notice of certain physical facts concerning the matter which appear from a casual inspection of the facility, itself. We note, therefore, that the space in the Authority's structure leased by Eagle, while located within the exterior walls of the structure, has no marked public entrance leading from the parking portion of the facility into the restaurant proper. The main and marked public entrance to Eagle's restaurant is located on Ninth Street. It appears from the record before us, furthermore, that Eagle at its own expense installed the major portion of the furnishings of its restaurant and all of the necessary fixtures to make the leased space suitable for the operation of its business. The Authority installed a bare minimum in the space ultimately leased to Eagle.

The lease between the Authority and Eagle contains a covenant binding Eagle to "occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority." Plaintiff refers to this covenant but we think the covenant does not have much bearing on the basic question presented to us. We have for decision the broad question of whether or not the maintenance of the facility by the Authority, admittedly a state instrumental-

ity, is in all its ramifications and details, including the leasing to private business, state action falling within the scope of the protective provisions of the Fourteenth Amendment. The referred to covenant is applicable to this case only if the answer to the broad question is in the affirmative since only under such circumstances would the Fourteenth Amendment be applicable to Eagle's business.

The question is to be decided in the light of the circumstances surrounding this entire matter. The nature of the enterprise conducted by the Authority is of primary importance to our decision. Unfortunately, the record before us is not as complete as we would have desired. We think, however, that we may take notice of the facts embodied in the opinion in *Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 439, 105 A. 2d 614, on which plaintiff relies. In that case we upheld against attack the constitutionality of the Parking Authority Act of 1951 (22 *Del. C.*, Ch. 5) and the legality of the proposed acts of the Authority pursuant to it.

In the *Ranken* case we had before us certain determinations made by the Authority in planning the erection of the facility in question. Thus, the Authority determined that in order to erect and operate the structure as a self-sustaining unit as required by the General Assembly, it would be necessary to obtain additional revenue from commercial leasing of space, and to utilize the space of the final structure upon the following ratio: 61% for parking; 39% for private leases. We assume that the structure as actually completed maintains this ratio. The Authority made a further determination that the cost of construction, including the cost of land, would be divided upon the following ratio: 38.4% to parking space; 61.6% to the leased area. We assume that this estimate of division of cost is the fact. Finally, the Authority determined that its revenue derived from the operation of the facility would come from these

sources upon the following ratio: 30.5% from parking; 69.5% from private leases. We assume this division to be the fact.

From the *Ranken* case it appears that the only public money used in the construction of the facility was the sum of $934,000 "advanced" by the City of Wilmington and used in the purchase of a portion of the land required. It did not appear in the *Ranken* case, and does not appear in the case now before us, what the terms and conditions of this "advance" by the city were.

We have not been furnished with the actual cost figures of the construction of the facility but since, in the *Ranken* case, the cost of construction of a parking facility alone was estimated to be approximately $3,800,000, and since the estimated cost allocated to parking space of a combined facility was 38.4%, we assume that the total cost of the presently existing facility was in the neighborhood of $6,100,000. It does appear as a fact, however, that the actual cost of construction was paid from the proceeds of the sale of revenue bonds issued by the Authority and, accordingly, upon the determined ratios, the public money "advanced" for the project amounts to approximately 15% of the total cost of the facility as finally erected.

From the *Ranken* case, also, it appears that the revenue from parking alone was predicted to be $150,000 annually which was estimated to amount to 30.5% of the total expected revenue ~~of the~~ combined facility. Accordingly, the facility's total revenue we assume to be approximately $342,000 annually, of which approximately $212,000 is derived from the rentals to commercial enterprises.

In the *Ranken* case we considered a constitutional attack upon the Authority's proposal on the basis that it had no authority to enter into private leases solely for the purpose of obtaining revenue to support the operation of the public

part of the facility, viz., the furnishing of off-street parking. We held, however, that the authority to lease to private business was valid. We held that the furnishing of off-street parking was a proper public purpose and met an existing need supported by a legislative finding to that effect and, since it was the fact that the proper public purpose could not be supplied as a self-supporting unit without additional revenue to be supplied by commercial leases, we held that the entering into such private leases did not destroy the public-use character of the facility.

We recognized in the *Ranken* case that the proposed leases to private businesses were wholly unrelated to the public purpose to be subserved by the parking facility, except as a source of additional revenue to permit the financing and operation of the parking facility. We were of the opinion that the supplying of off-street parking services occupying 61% of the total space of the structure, despite the leasing of the balance of the space to private business, was and remained the paramount or primary use of the structure. We held, therefore, that the leasing to private business, while necessary financially to the project, was nevertheless a subordinate or incidental use of public property. We, accordingly, upheld the constitutionality of the grant of power to lease which, in the absence of such circumstances, would have been an unconstitutional use of public property.

We summed up our holding in the *Ranken* case in the following language:

> "Since the dominant or underlying purpose of the contemplated project subserves a public use, commercial leasing of space therein for uses unrelated to the public use is permitted to the extent, and only to the extent, that such leasing is necessary and feasible to enable the Authority to finance the project."

We think it apparent, therefore, that the only connection Eagle has with the public facility operated by the Author-

ity is the furnishing of the sum of $28,700 annually in the form of rent which is used by the Authority to defray a portion of the operating expense of an otherwise unprofitable enterprise.

We think the case before us is distinguishable from the cases relied on by the plaintiff. In the first place, it is quite apparent, nor is there any suggestion to the contrary made by the plaintiff, that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility. As far as the record before us indicates, it was immaterial to the Authority what type of business would occupy the space now occupied by Eagle. The Authority's sole interest was in the obtaining of money in the form of rent. That money is thereafter used by the Authority to support the public purpose of supplying off-street parking from which the plaintiff and the rest of the public benefit.

It is further clear from this record, and from the *Rankow* case, that at no time did the Authority contemplate the establishment of a restaurant in the structure for the use of its parking patrons. On the contrary, the commercial leases entered into by the Authority were given to the highest bidders in terms of rent after the solicitation of bids by public advertisement. The decision to lease to a particular lessee was made upon the considerations of the applicants' financial responsibility and the amount of rent agreed to be paid. It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking.

The plaintiff argues that the use of public money to purchase a portion of the land required brings this case within the rule of the cited authorities. But we think not. At the most, approximately 15% of the total cost is represented by the public "advance" of money. To accept the plaintiff's view would require us in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise. It is obvious that there is no guide for judicial speculation upon such a matter. If it is said that the contribution of any public money is sufficient to change the nature of the enterprise, the answer is that it has been held that a slight contribution is insufficient. Cf. *Eaton* v. *Board of Managers*, 164 F. Supp. 191.

Fundamentally, the problem is to be resolved by considerations of whether or not the public government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; if it is not the case, the operators of the enterprise are free to discriminate as they will. *Shelley* v. *Kraemer*, 334 U. S. 1, 68 S. Ct. 842. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We apply the law, whether or not that law follows the current fashion of social philosophy.

Particularly is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone.

We think the Authority and, through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware.

It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to everyone. This is the common law, and the law of Delaware as restated in 24 *Del. C.*, §1501 with respect to restaurant keepers. 10 *Am. Jur., Civil Rights*, §§21, 22; 52 *Am. Jur., Theatres*, §9; *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment.

Finally, plaintiff contends that 24 *Del. C.*, §1501, has no application in the case at bar because Eagle, since it serves alcoholic beverages to its patrons, is a tavern or inn and not a restaurant. It is argued that, at common law, an inn or tavern could deny service to no one asking for it. We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 *Del. C.*, §1501, which does not compel the operator of a restaurant to give service to all persons seeking such.

For the foregoing reasons, the judgment of the court below is reversed.

APPENDIX B

Statutes

Title 24 Delaware Code, Section 1501:

§1501. Exclusion of customers; definition.

No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business.

As used in this section, "customers" includes all who have occasion for entertainment or refreshment.

Title 22 Delaware Code, Chapter 5, Sections 501-515:

§501. Findings and declaration of policy

It is determined and declared as a matter of legislative finding that—

(1) Residential decentralization in incorporated cities has been accompanied by an ever increasing trend in the number of persons entering the business sections by private automobile as compared with other modes of transportation;

(2) The free circulation of traffic of all kinds through the streets of cities is necessary to the health, safety, and general welfare of the public whether residing in the city or traveling to, through, or from the city, in the course of lawful pursuits;

(3) The great increased use by the public of motor vehicles of all kinds has caused serious traffic congestion on the streets of cities;

(4) The parking of motor vehicles on the streets has contributed to this congestion to such an extent as to interfere seriously with the primary use of such streets for the movement of traffic;

(5) Such parking prevents the free circulation of traffic in, through, and from the city, impedes rapid and effective fighting of fires and the disposition of police forces in the district and endangers the health, safety, and welfare of the general public;

(6) Such parking threatens irreparable loss in valuations of property in the city which can no longer be readily reached by vehicular traffic;

(7) This parking crisis, which threatens the welfare of the community, can be reduced by providing sufficient off-street parking facilities properly located in the several residential, commercial, and industrial areas of the city;

(8) The establishment of a parking authority will promote the public safety, convenience, and welfare;

(9) It is intended that the parking authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;

therefore it is declared to be the policy of this State to promote the safety and welfare of the inhabitants thereof by the creation in incorporated cities of bodies corporate and politic to be known as "Parking Authorities" which shall exist and operate for the purposes contained in this chapter. Such purposes are declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain.

§502. Definitions

As used in this chapter, unless the context requires a different meaning—

"Authority" means a body politic and corporate created pursuant to this chapter;

"Board" means the governing body of the Authority;

"Bonds" means and includes the notes, bonds and other evidence of indebtedness, or obligations, which the Authority is authorized to issue pursuant to section 504 of this title;

"City" means incorporated city or town;

"Construction" means and includes acquisition and construction, and "to construct" means and includes to acquire and to construct, all in such manner as may be deemed desirable;

"Facility" or "facilities" means lot or lots, buildings and structures, above, at, or below the surface of the earth, including equipment, entrances, exits, fencing, and all other accessories necessary or desirable for the safety and convenience of the parking of vehicles;

"Federal agency" means and includes the United States of America, the President of the United States of America, and any department or corporation agency or instrumentality heretofore, or hereafter created, designated, or established by the United States of America;

"Improvement" means and includes extension, enlargement, and improvement, and "to improve" means and includes to extend, to enlarge, and to improve, all in such manner as may be deemed desirable.

"Municipality" means any county, incorporated city or incorporated town of this State;

"Persons" means and includes natural persons;

"Project" means any structure, facility, or undertaking which the Authority is authorized to acquire, construct, improve, maintain, or operate under the provisions of this chapter.

§503. Method of incorporation

(a) Whenever the city council or other governing body of a city desires to organize an Authority, under the provisions of this chapter, it shall adopt an ordinance signifying its intention to do so.

In the event that such ordinance sets forth the proposed articles of incorporation in full it shall not be required, any law to the contrary notwithstanding, in publishing such ordinance, under the provisions of existing law, to publish such proposed articles of incorporation in full, but it shall be sufficient compliance with such law in such publication to set forth briefly the substances of such proposed articles of incorporation and to refer to the provisions of this chapter. Thereafter the city council shall cause a notice of such ordinance to be published at least one time in a newspaper published and of general circulation in the county in which the Authority is to be organized. The notice shall contain a brief statement of the substance of the ordinance, including the substance of such articles, making reference to this chapter, and shall state that on a day certain, not less than three days after publication of the notice, articles of incorporation of the proposed Authority will be filed with the Secretary of State of this State.

(b) On or before the day specified in the notice the city council shall file with the Secretary of State articles of incorporation together with proof of publication of the notice referred to in subsection (a) of this section. The articles of incorporation shall set forth—

(1) The name of the Authority;

(2) A statement that such Authority is formed under the provisions of this chapter;

(3) The name of the city, together with the names and addresses of its council members;

(4) The names, addresses and term of office of the first members of the board of the Authority.

All of which matter shall be determined in accordance with the provisions of this chapter. The articles of incorporation shall be executed by the incorporating city by its proper officer and under its municipal seal.

(c) If the Secretary of State finds that the articles of incorporation conform to law he shall forthwith, but not prior to the day specified in the notice, endorse his approval thereon, and when all proper fees and charges have been paid shall file the articles and issue a certificate of incorporation to which shall be attached a copy of the approved articles. Upon the issuance of such certificate of incorporation by the Secretary of State, the corporate existence of the Authority shall begin when such certificate has been recorded in the office for the recording of deeds in the county where the principal office of the Authority is to be located. The certificate of incorporation shall be conclusive evidence of the fact that such Authority has been incorporated, but proceedings may be instituted by the State to dissolve any Authority which shall have been formed without substantial compliance with the provisions of this section.

(d) When the Authority has been organized and its officers elected, the secretary shall certify to the Secretary of State the names and addresses of its officers, as well as the principal office of the Authority. Any change in the

location of the principal office shall likewise be certified to the Secretary of State within 10 days after such change.

§504. Purpose and powers

(a) The Authority, incorporated under this chapter, shall constitute a public body corporate and politic, exercising public powers of the State as an agency thereof, and shall be known as the Parking Authority of the city, but shall in no way be deemed to be an instrumentality of the city or engaged in the performance of a municipal function. The Authority shall be for the purpose of conducting the necessary research activity, to maintain current data leading to efficient operation of off-street parking facilities, for the fulfillment of public needs in relation to parking, establishing a permanent coordinated system of parking facilities, planning, designing, locating, acquiring, holding, constructing, improving, maintaining and operating, owning, leasing, either in the capacity of lessor or lessee, land and facilities to be devoted to the parking of vehicles of any kind.

The Authority shall not have the power to directly engage in the sale of gasoline, the sale of automobile accessories, automobile repair and service or any other garage service, other than the parking of vehicles, and the Authority shall not directly engage in the sale of any commodity of trade or commerce; provided, however, that the Authority shall have the power to lease space in any of its facilities for use by the lessee for the sale of gasoline, the sale of automobile accessories, automobile repair and service or any other garage service and to lease portions of any of its garage buildings or structures for commercial use by the lessee, where, in the opinion of the Authority, such leasing is necessary and feasible for the financing and operation of such facilities. Any such lease shall be granted by the Authority to the highest and best bidder, upon terms

specified by the Authority, after due public notice has been given, asking for competitive bids; provided, however, that if after such public notice no bid is received and/or the Authority rejects any bid or bids received, thereafter the Authority may negotiate any such lease or leases without further public notice but on a basis more favorable than that contained in any bid or bids rejected, if any. The phrase "due public notice," as used in this section, shall mean a notice published at least 10 days before the award of any such lease in a newspaper of general circulation published in a municipality where the Authority has its principal office, and if no newspaper is published therein, then by publication in a newspaper of general circulation in the County where the Authority has its principal office. The Authority may reject any or all bids if, in the opinion of the Authority, any such lease granted as a result of any such bid or bids would not be adequate or feasible for the financing and operation of such facilities.

(b) Every Authority may exercise all powers necessary or convenient for the carrying out of the aforesaid purposes including, but without limiting the generality of the foregoing, the rights and powers described below.

(1) To have existence for a term of 50 years as a corporation and thereafter until the principal and interest upon all of its bonds shall have been paid or provisions made for such payment, and until all of its other obligations shall have been discharged.

(2) To sue and be sued, implead and be impleaded, complain and defend in all courts.

(3) To adopt, use and alter at will a corporate seal.

(4) To acquire, purchase, hold, lease as lessee, and use any franchise, property, real, personal, or mixed, tangible or intangible, or any interest therein, neces-

sary or desirable for carrying out the purpose of the Authority and to sell, lease as lessor, transfer, and dispose of any property or interest therein at any time required by it.

(5) To acquire by purchase, lease or otherwise, and to construct, improve, maintain, repair, and operate projects.

(6) To make by-laws for the management and regulation of its affairs.

(7) To appoint officers, agents, employees, and servants, to prescribe their duties, and to fix their compensation.

(8) To fix, alter, charge, and collect rates and other charges for its facilities at reasonable rates to be determined exclusively by it, subject to appeal as provided in this paragraph, for the purposes of providing for the payment of the expenses of the Authority, the construction, improvement, repair, maintenance, and operation of its facilities and properties, the payment of the principal of and interest on its obligations, and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such obligation or with the city. Any person questioning the reasonableness of any rate fixed by the Authority may bring suit against the Authority in the Superior Court of the county wherein the project is located. The Superior Court shall have exclusive jurisdiction to determine the reasonableness of rates and other charges fixed, altered, charged, or collected by the Authority. Appeals may be taken to the Supreme Court within 30 days after the Superior Court has rendered a final decision.

(9) To borrow money, make and issue negotiable notes, bonds, refunding bonds, and other evidences of indebtedness or obligations of the Authority; the bonds to have a maturity date not longer than forty years from the date of issue, except that no refunding bonds shall have a maturity date longer than the life of the Authority; and to secure the payment of such bonds or any part thereof by pledge, or deed of trust, of all, or any of its revenues and receipts, and to make such agreements with the purchasers or holders of such bonds, or with others in connection with any such bonds, whether issued or to be issued, as the Authority deems advisable, and in general to provide for the security for the bonds and the rights of the holders thereof.

(10) To make contracts of every name and nature, and to execute all instruments necessary or convenient for the carrying on of its business.

(11) Without limitation of the foregoing to borrow money and accept grants from, and to enter into contracts, leases, or other transactions with, any Federal agency, State of Delaware, municipality, corporation or authority.

(12) To have the power of eminent domain.

(13) To pledge, hypothecate, or otherwise encumber all or any of the revenues or receipts of the Authority, as security for all or any of the obligations of the Authority.

(14) To do all acts and things necessary for the promotion of its business and the general welfare of the Authority to carry out the powers granted to it by this chapter or any other law.

(15) To enter into contracts with the State of Delaware, municipalities, corporations or authorities for the use of any project of the Authority and fixing the amount to be paid therefor.

(16) To enter into contracts of group insurance for the benefit of its employees, and to set up a retirement or pension fund for such employees, similar to that existing in the municipality where the principal office of the project is located.

(c) The Authority shall not at any time, or in any manner, pledge the credit or taxing power of the State of Delaware or any political subdivision, nor shall any of its obligations be deemed to be obligations of the State of Delaware, or of any of its political subdivisions, nor shall the State of Delaware or any political subdivision thereof be liable for the payment of principal or of interest on such obligations.

(d) In addition to the provisions in this chapter provided for the financing of the costs of acquiring lands and premises and for the construction and improvement of parking projects, the Authority may by resolution, as provided in this subsection, establish a benefit district.

(1) One benefit district may be designated for the condemnation of lands for one or several parking stations. The Authority shall determine the percentage of the costs of condemnation which shall be assessable to such benefit district. Not more than 80 per cent of such costs shall be assessable to such benefit district or benefit districts.

(2) After a benefit district has been established, no further proceedings shall be taken unless there is filed with the secretary of the Authority, within sixty days of the passage of the resolution creating the benefit district, a petition

requesting the establishment of such public parking station or stations. Such petition shall be signed by the resident owners of real estate owning not less than 51 per cent of the front feet of the real estate fronting or abutting upon any street included within the limits of the benefit district. In determining the sufficiency of the petition, lands owned by the city, county, State or United States or by nonresident owners of real estate within the benefit district shall not be counted in the aggregate of lands within such benefit district. After any petition has been signed by an owner of land in the benefit district, the change of ownership of the land shall not affect the petition. In any case where the owners of lands within the benefit district are tenants in common, each co-tenant shall be considered a landowner to the extent of his undivided interest in the land. The owner of a life estate shall also be deemed a landowner for the purpose of this chapter. Guardians of minors or insane persons may petition for their wards when authorized by the proper court so to do. Resident owner of land, as defined in this paragraph, shall be any landowner residing in the city and owning land in the benefit district. No suit shall be maintained in any court to enjoin or in any way contest the establishment of such parking stations or the establishment of a benefit district unless the suit be instituted and summons served within 30 days from and after the date of the filing of such petition with the secretary of the Authority.

(3) Whenever the Authority shall have acquired lands for public parking stations and shall have declared and ordered that not more than 80 per cent of the cost of establishing or improving public parking stations, as provided in this subsection, will be paid by the levy of special assessments upon real estate situate in any one or more benefit districts, it shall cause to be made by some competent per-

son an estimate, under oath, of the cost thereof, which estimate shall be filed with the secretary of the Authority. The assessment against the benefit district shall be apportioned among the various lots, tracts, pieces, and parcels of land within the benefit district in accordance with the special benefits accruing thereto, this apportionment of benefit assessments to be made by three disinterested property owners appointed by the mayor of the city or if such city has no mayor, by its chief executive officer within 30 days after the filing of the estimate of the cost of the improvement with the secretary of the Authority. As soon as the amount chargeable against each piece of property is ascertained, the Authority of such city shall by resolution levy such amount against this real estate in the benefit district, which resolution shall be published once in a newspaper of general circulation in such city. No suit to question the validity of the proceedings of the Authority shall be commenced after 30 days from the awarding of a contract for such improvements and until the expiration of the 30 days the contractor shall not be required to commence work under his contract. If no suit shall be filed within such 30 days then all proceedings therefore had shall be held to be regular, sufficient, and valid.

(4) The cost of condemnation and improvement of such public parking stations may be levied and assessed in not to exceed 10 installments, with interest on the whole amount remaining due and unpaid each year at a rate of interest not exceeding 5 per cent per annum. Any owner of land within the benefit district may, within 30 days after the assessment resolution is passed, pay the entire amount assessed against the land. The Authority of such city may assess, levy, and collect the cost of condemnation and improvement of such public parking stations as is assessed against the privately owned property in the benefit district.

The assessment shall constitute a lien from the date the same is assessed by resolution, as provided in this paragraph, against the respective premises against which the same is levied, in the same manner as city taxes on real estate are constituted a lien, and shall be collectible in the manner provided for the collection of taxes assessed against the real estate of the City of Wilmington by monition process, as provided in Chapter 143, Vol. 36, Laws of Delaware.

(e) When any real property or any interest therein heretofore or hereafter acquired by the Authority is no longer needed for the purposes defined in this chapter, or when, in the opinion of the Authority it is not desirable or feasible to hold and use such property for said purposes, the Authority may sell the same at private or public sale as the Authority shall determine, granting and conveying to the purchaser thereof a fee simple marketable title thereto. The Authority may make such sale for such price and upon such terms and conditions as the Authority deems advisable and for the best interests of the Authority and may accept in payment, wholly or partly, cash, bonds, mortgages, debentures, notes, warrants, or other evidences of indebtedness as the Authority may approve. The consideration received from any such sale may be applied by the Authority, in its discretion, to the repayment, in whole or in part, of any funds contributed to the Authority by a municipality under the provisions of section 508 of this title or retained by the Authority for the purposes of this chapter. Without limitation of the foregoing, the Authority may accept as consideration in whole or in part for the sale of any such real property, a covenant, agreement or undertaking on the part of any purchaser to provide and maintain off-street parking facilities on such property or a portion thereof for the fulfillment of public parking needs for such period and un-

der such terms and conditions as the Authority shall determine. Any such covenant, agreement or undertaking on the part of the purchaser as aforesaid and the right of the Authority to fix and alter rates to be charged for any such parking facilities as well as the right of appeal as in this section provided, shall be set forth and reserved in the deed or deeds of conveyance. Any such covenant, agreement or undertaking may be enforced by the Authority in an action for specific performance brought in the Court of Chancery of this State. As amended 49 Del. Laws, Ch. 72, eff. May 14, 1953; 50 Del. Laws, Ch. 222, §1, eff. June 8, 1955; 50 Del. Laws, Ch. 279, §§1, 2, eff. June 13, 1955.

§505. Bonds

(a) The bonds of any Authority referred to and authorized to be issued by this chapter shall be authorized by resolution of the board thereof, and shall be of such series; bear such date or dates; mature at such time or times not exceeding 40 years from their respective dates; bear interest at such rate or rates, not exceeding 6 per cent per annum payable semi-annually; be in such denominations; be in such form, either coupon or fully registered, without coupons; carry such registration, exchangeability, and interchangeability privileges; be payable in such medium or payment and at such place or places; be subject to such terms of redemption, not exceeding 105 per cent of the principal amount thereof; and be entitled to such priorities in the revenues or receipts of such Authority, as such resolution or resolutions may provide. The bonds shall be signed by such officers as the Authority shall determine, and coupon bonds shall have attached thereto interest coupons bearing the facsimile signature of the treasurer of the Authority, all as may be prescribed in such resolution or resolutions. Any such bonds may be issued and delivered notwithstanding that one or more of the officers signing

such bonds, or the treasurer whose facsimile signature shall be upon the coupon, or any officer thereof, shall have ceased to be such officer or officers at the time when such bonds shall actually be delivered.

The bonds may be sold at public or private sale for such price or prices as the Authority shall determine. The interest cost to maturity of the money received for any issue of the bonds shall not exceed 6 per centum per annum. Pending the preparation of the definitive bonds, interim receipts may be issued to the purchaser or purchasers of such bonds and may contain such terms and conditions as the Authority may determine.

(b) Any resolution or resolutions authorizing any bonds may contain provisions which shall be part of the contract with the holders thereof as to (1) pledging the full faith and credit of the Authority for such obligations or restricting the same to all or any of the revenues of the Authority from all or any projects or properties; (2) the construction, improvement, operation, extension, enlargement, maintenance, and repair of the project, and the duties of the Authority with reference thereto; (3) the terms and provisions of the bonds; (4) limitations on the purposes to which the proceeds of the bonds then, or thereafter to be issued, or of any loan or grant by the United States, may be applied; (5) the rate of tolls and other charges for use of the facilities of, or for the services rendered by the Authority; (6) the setting aside of reserves or sinking funds and the regulation and disposition thereof; (7) limitations on the issuance of additional bonds; (8) the terms and provisions of any deed of trust or indenture securing the bonds, or under which the same may be issued, and (9) any other additional agreements with the holders of the bonds.

(c) Any Authority may enter into any deeds of trust indentures or other agreements, with any bank or trust

company or other person or persons in the United States having power to enter into the same, including any Federal agency, as security for such bonds, and may assign and pledge all or any of the revenues or receipts of the Authority thereunder. Such deed of trust, indenture, or other agreement, may contain such provisions as may be customary in such instruments, or as the Authority may authorize, including provisions as to: (1) the construction, improvement, operation, maintenance, and repair of any project and the duties of the Authority with reference thereto; (2) the application of funds and the safeguarding of funds on hand or on deposit; (3) the rights and remedies of the trustee and holders of the bonds which may include restrictions upon the individual right of action of such bondholder, and (4) the terms and provisions of the bonds or the resolutions authorizing the issuance of the same.

(d) The bonds shall have all the qualities of negotiable instruments under the law merchant and the negotiable instruments law of the State of Delaware.

§506. Remedies of bondholders

(a) The rights and the remedies conferred upon or granted to the bondholders in this section shall be in addition to, and not in limitation of, any rights and remedies lawfully granted to such bondholders by the resolution or resolutions providing for the issuance of bonds, or by any deed of trust, indenture, or other agreement under which the same may be issued. In the event that the Authority shall default in the payment of principal of, or interest on any of the bonds, after the principal or interest shall become due, whether at maturity or upon call for redemption, and such default shall continue for a period of 30 days, or in the event that the Authority shall fail or refuse to comply with the provisions of this chapter, or shall default in any

agreement made with the holders of the bonds, the holders of 25 per cent in aggregate principal amount of the bonds then outstanding by instrument or instruments filed in the office of the recorder of deeds of the county, and proved or acknowledged in the same manner as a deed to be recorded, may appoint a trustee to represent the bondholders for the purpose provided in this section.

(b) Such trustee, and any trustee under any deed of trust, indenture or other agreement, may, and upon written request of the holders of 25 per cent or such other percentages as may be specified in any deed of trust, indenture, or other agreement, in principal amount of the bonds then outstanding, shall, in his or its own name—

(1) By mandamus, or other suit, action or proceeding at law or in equity, enforce all rights of the bondholders, including the right to require the Authority to collect rates, rentals or other charges adequate to carry out any agreement as to or pledge of the revenues or receipts of the Authority, and to require the Authority to carry out any other agreements with or for the benefit of the bondholders, and to perform its and their duties under this chapter;

(2) Bring suit upon the bonds;

(3) By action or suit in equity require the Authority to account as if it were the trustee of an express trust for the bondholders;

(4) By action or suit in equity enjoin any acts or things which may be unlawful or in violation of the rights of the bondholders;

(5) By notice in writing to the Authority declare all bonds due and payable, and if all defaults shall be made good, then with the consent of the holders of 25 per

cent or such other percentage as may be specified in any deed of trust, indenture, or other agreement, of the principal amount of the bonds then outstanding, to annul such declaration and its consequences.

(c) The Court of Chancery in and for the county wherein the Authority is located shall have jurisdiction of any suit, action or proceedings by the trustee on behalf of the bondholders. Any trustee when appointed or acting under a deed of trust, indenture, or other agreement, and whether or not all bonds have been declared due and payable, shall be entitled as of right to the appointment of a receiver, who may enter and take possession of the facilities of the Authority or any part or parts thereof, the revenues or receipts from which are, or may be, applicable to the payment of the bonds in default, and operate and maintain the same, and collect and receive all rentals and other revenues thereafter arising therefrom, in the same manner as the Authority or the board might do, and shall deposit all such moneys in a separate account and apply the same in such manner as the court shall direct. In any suit, action or proceeding by the trustee the fees, counsel fees and expenses of the trustee, and of the receiver, if any, and all costs and disbursements allowed by the court shall be a first charge on any revenues and receipts derived from the facilities of the Authority, the revenues or receipts from which are or may be applicable to the payment of the bonds in default. The trustee shall, in addition to the foregoing, have and possess all of the powers necessary or appropriate for the exercise of any functions specifically set forth in this section, or incident to the general representation of the bondholders in the enforcement and protection of their rights.

(d) Nothing in this section, or any other section of this chapter, shall authorize any receiver appointed pursuant

to this chapter for the purpose of operating and maintaining any facilities of the Authority to sell, assign, mortgage, or otherwise dispose of, any of the assets of whatever kind and character belonging to the Authority. It is the intention of this chapter to limit the powers of such receiver to the operation and maintenance of the facilities of the Authority as the court shall direct; and no holder of bonds of the Authority, nor any trustee shall ever have the right in any suit, action or proceedings at law or in equity to compel a receiver, nor shall any receiver ever be authorized, or any court be empowered to direct the receiver to sell, assign, mortgage, or otherwise dispose of, any assets of whatever kind or character belonging to the Authority.

§507. Governing body.

(a) The powers of each Authority shall be exercised by a board composed of five members, all of whom shall be residents of the city creating the Authority. The mayor of the city, or if such city or town has no mayor, its chief executive officer, shall appoint the members of the board, one of whom shall serve for one year, one for two years, one for three years, one for four years, and one for five years from the first day of July in the year in which such Authority is created as provided in this chapter. Thereafter the mayor shall not sooner than 60 days, nor later than 30 days prior to July first in each year in which a vacancy occurs, appoint a member of the board for a term of five years to succeed the member whose term expires on the first day of July next succeeding. Vacancies for unexpired terms that occur more than 60 days before the end of a term shall be promptly filled by appointment by the mayor. All such appointments shall be subject to the confirmation of the city council or other governing body of the city. Any member of the board may be removed for cause by the mayor, or if such city or town has no mayor, by its chief executive officer.

with the concurrence of two-thirds of all the members of the council, or other governing body of the city or town, and the person against whom such charges are made shall be given a reasonable opportunity to make his defense.

(b) Members shall hold office until their successors have been appointed and may succeed themselves. A member shall receive no compensation for his services, but shall be entitled to the necessary expenses, including traveling expenses, incurred in the discharge of his duties.

(c) The members of the board shall select from among themselves a chairman, a vice-chairman, and such other officers as the board may determine. The board may employ a secretary, an executive director, its own counsel and legal staff, and such technical experts and such other agents and employees, permanent or temporary, as it may require, and may determine the qualifications and fix the compensation of such persons. Three members of the board shall constitute a quorum for its meetings. Members of the board shall not be liable personally on the bonds or other obligations of the Authority, and the rights of creditors shall be solely against such Authority. The board may delegate to one or more of its agents or employees such of its powers as it deems necessary to carry out the purposes of this chapter, subject always to the supervision and control of the board. The board shall have full authority to manage the properties and business of the Authority and to prescribe, amend, and repeal by-laws, rules and regulations governing the manner in which the business of the Authority may be conducted, and the powers granted to it may be exercised and embodied.

§508. Acquisition of lands; cost financing by municipality

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The Authority may acquire by purchase or eminent domain proceedings either the fee or such rights, title, inter-

est, or easement in such lands, as the Authority deems necessary for any of the purposes mentioned in this chapter. No property devoted to a public use, nor any property of a public service company, property used for burial purposes, places of public worship, nor property which on June 21, 1951 was used as a facility or facilities for the parking of motor vehicles, so long as the property is continuously so used, and so long as the operation of the facility complies with parking and traffic ordinances of the city shall be taken under the right of eminent domain. The right of eminent domain shall be exercised by the Authority in the manner provided by chapter 61 of Title 10.

The right of eminent domain conferred by this section may be exercised only within the city.

Court proceedings necessary to acquire property or property rights, for purposes of this chapter, shall take precedence over all caus not involving the public interest in all courts to the end that the provision of parking facilities be expedited.

Any municipality establishing an Authority under this chapter may, under such terms and conditions as it may deem appropriate, provide for and pay to such Authority such sum or sums of money necessary to acquire in whole or in part the lands upon which such Authority may undertake to erect a parking facility as herein provided and/or such sum or sums of money necessary to construct in whole or in part a parking facility or facilities as herein provided; the municipality for the purpose of providing said money may issue its general obligation bonds secured by the faith and credit of the municipality. The aggregate amount of general obligation bonds issued by a municipality under this provision shall be in addition to and not within the limitations of any existing statutory debt limitation of the municipality. As amended 49 Del. Laws, Ch. 2, eff. June 4, 1953; 50 Del. Laws, Ch. 221, §1, eff. June 8, 1955.

§509. Moneys; examination of accounts

All moneys of any Authority, from whatever source derived, shall be paid to the treasurer of the Authority. The moneys shall be deposited, in the first instance by the treasurer in one or more banks or trust companies, in one or more special accounts. The moneys in the accounts shall be paid out on the warrant or other order of the chairman of the Authority, or of such other person or persons as the Authority may authorize to execute such warrants or orders. Every Authority shall have at least an annual examination of its books, accounts and records by a certified public accountant. A copy of such audit shall be delivered to the city creating the Authority. A concise financial statement shall be published annually at least once in a newspaper of general circulation in the city where the principal office of the Authority is located. If such publication is not made by the Authority the city shall publish such statement at the expense of the Authority. If the Authority fails to make such an audit then the auditor or accountant designated by the city may, from time to time, examine at the expense of the Authority, the accounts and books of the Authority, including its receipts, disbursements, contracts, leases, sinking funds, investments, and any other matters relating to its finances, operation, and affairs.

The Attorney General of the State may examine the books, accounts and records of any Authority.

§510. Competition in award of contracts

(a) All construction, reconstruction, repairs, or work of any nature made by any Authority, where the entire cost, value, or amount of such construction, reconstruction, repairs, or work including labor and materials, shall exceed $500, except reconstruction, repairs, or work done by employees of the Authority, or by labor supplied un-

der agreement with any Federal or State agency with supplies and materials purchased as provided in this section, shall be done only under contract or contracts to be entered into by the Authority with the lowest and best bidder, upon proper terms, after due public notice has been given, asking for competitive bids as provided in this section. No contract shall be entered into for construction or improvement or repair of any project, or portion thereof, unless the contractor shall give an undertaking with a sufficient surety or sureties, approved by the Authority, and in an amount fixed by the Authority for the faithful performance of the contract. All such contracts shall provide, among other things, that the person or corporation entering into such contract with the Authority will pay for all materials furnished and services rendered for the performance of the contract, and that any person or corporation furnishing such materials or rendering such services may maintain an action to recover for the same against the obligor in the undertaking, as though such person or corporation was named therein, provided the action is brought within one year after the time the cause of action accrued. Nothing in this section shall be construed to limit the power of the Authority to construct, repair, or improve any project or portion thereof, or any addition, betterment, or extension thereto directed by the officers, agents, and employees of the Authority or otherwise than by contract.

(b) All supplies and materials costing $500 or more shall be purchased only after due advertisement as provided in this section. The Authority shall accept the lowest bid or bids, kind, quality, and material being equal, but the Authority may reject any or all bids or select a single item from any bid. The provisions as to bidding shall not apply to the purchase of patented and manufactured products offered for sale in a noncompetitive market, or solely by a manufacturer's authorized dealer.

(c) The terms, advertisement or due public notice, wherever used in this section shall mean a notice published at least 10 days before the award of any contract in a newspaper of general circulation published in a municipality where the Authority has its principal office, and if no newspaper is published therein, then by publication in a newspaper of general circulation in the county where the Authority has its principal office.

(d) No member of the Authority or officer or employee thereof shall either directly or indirectly be a party to, or be in any manner interested in, any contract or agreement with the Authority for any matter, cause, or thing whatsoever by reason whereof any liability or indebtedness shall in any way be created against such Authority. If any contract or agreement shall be made in violation of the provisions of this section the same shall be null and void and no action shall be maintained thereon against such Authority.

(e) Subject to the provisions of subsections (a)-(d) of this section any Authority may, but without intending by this provision to limit any powers of such Authority, enter into and carry out such contracts or establish or comply with such rules and regulations concerning labor and materials and other related matters in connection with any project or portion thereof as the Authority deems desirable, or as may be requested by any Federal agency that may assist in the financing of such project or any part thereof. The provisions of this section shall not apply to any case in which the Authority has taken over by transfer or assignment any contract authorized to be assigned to it under the provisions of section 515 of this title, nor to any contract in connection with the construction of any project which the Authority may have had transferred to it by any person or private corporation.

§511. Use of projects

The use of the facilities of the Authority and the operation of its business shall be subject to the rules and regulations from time to time adopted by the Authority. The Authority shall not do anything which will impair the security of the holders of the obligations of the Authority, or violate any agreements with them or for their benefits.

§512. Limitation of powers

The State of Delaware hereby pledges to and agrees with any person, firm or corporation, or Federal agency subscribing to, or acquiring the bonds to be issued by the Authority for the construction, extension, improvement, or enlargement of any project or part thereof, that the State will not limit or alter the rights vested in the Authority until all bonds at any time issued, together with the interest thereon, are fully met and discharged. The State of Delaware further pledges to, and agrees with, the United States and any other Federal agency, that if any Federal agency constructs or contributes any funds for the construction, extension, improvement, or enlargement of any project, or any portion thereof, the State will not alter or limit the rights and powers of the Authority in any manner which would be inconsistent with the continued maintenance and operation of the project or the improvement thereof, or which would be inconsistent with the due performance of any agreements between the Authority and any such Federal agency, and the Authority shall continue to have and may exercise all powers granted in this chapter, so long as the same shall be necessary or desirable, for the carrying out of the purposes of this chapter, and the purposes of the United States in the construction or improvement or enlargement of the project or such portion thereof.

§513. Termination of Authority

When any Authority shall have finally paid and discharged all bonds, which, together with the interest due thereon, shall have been secured by a pledge of any of the revenues or receipts of a project, it may, subject to any agreements concerning the operation or disposition of such projects, convey such project to the city creating the Authority. When any Authority shall have finally paid and discharged all bonds issued and outstanding and the interest due thereon, and settled all other claims which may be outstanding against it, it may convey all its property to the city and terminate its existence. A certificate requesting termination of the existence of the Authority shall be filed in the office of the Secretary of State. If the certificate is approved by the city creating the Authority by its ordinance or ordinances, the Secretary shall note the termination of existence on the record of incorporation and return the certificate with his approval shown thereon to the board, which shall cause the same to be recorded in the office of the recorder of deeds of the county. Thereupon the property of the Authority shall pass to the city and the Authority shall cease to exist.

§514. Exemption from taxation; payments in lieu of taxes

The effectuation of the authorized purposes of the Authorities created under this chapter shall and will be in all respects for the benefit of the residents of incorporated cities for the increase of their commerce and prosperity, since such Authorities will be performing essential governmental functions and for the improvement of their health, safety, and living conditions, and, in effectuating such purposes, such Authorities shall not be required to pay any taxes or assessments upon any property acquired or used by them for such purposes. In lieu of such taxes or special assessments an Authority may agree to make payments to

the city or the county or any political subdivision. The bonds issued by any Authority, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation within this State.

§515. Transfer of existing facilities to Authority

(a) Any municipality or owner may sell, lease, lend, grant, or convey to any Authority any project, or any part or parts thereof, or any interest in real or personal property which may be used by the Authority in the construction, improvement, maintenance, or operation of any project. Any municipality may transfer, assign, and set over to any Authority any contracts which may have been awarded by the municipality for the construction of projects not begun, or if begun not completed. The territory being served by any project, or the territory within which such project is authorized to render service at the time of the acquisition of such project by an Authority, shall constitute the area in which such Authority shall be authorized to render service.

(b) The Authority shall first report to and advise the city by which it was created of the agreement to acquire, including all its terms and conditions.

The proposed action of the Authority, and the proposed agreement to acquire, shall be approved by the city council. Such approval shall be by two-thirds vote of all of the members of the council.

(c) This section, without reference to any other law, shall be deemed complete for the acquisition by agreement of projects as defined in this chapter located wholly within or partially without the city causing such Authority to be incorporated, any provisions of other laws to the contrary notwithstanding, and no proceedings or other action shall be required except as prescribed in this section.

APPENDIX C

Mandate

THE SUPREME COURT
OF THE STATE OF DELAWARE

To the Honorable the Chancellor of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

Civil Action No. 1029

WILLIAM H. BURTON,

Plaintiff,

—v.—

THE WILMINGTON PARKING AUTHORITY, *et al.*,

Defendants.

a certain judgment or order was entered on the 11th day of May 1959, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on January 12, 1960, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby reversed, with costs, hereby taxed in the sum of Twelve Dollars ($12.00) to be recovered by The Wilmington Parking Authority, *et al.* against William H. Burton, with right

of execution; and the said cause is hereby remanded with instructions to take such further proceedings therein as may be necessary in conformity with the opinion of this Court.

WITNESS The Honorable Clarence A. Southerland, our Chief Justice at Dover, the First day of January, A.D. 1960. Issued February 4, 1960.

/s/ T. TOWNSEND, JR.
Clerk of the Supreme Court.

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